89-219

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1989

Gary Leon Brown, Petitioner,

v.

State of Alabama

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

Whether a death sentence may be constitutionally imposed when evidence pertaining to an element of a capital offense was procured through coercive prosecutorial interrogation tactics.

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1989

GARY LEON BROWN, PETITIONER,

v.

STATE OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner, Gary Leon Brown, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The unreported opinion of the Supreme Court of Alabama was filed on March 10, 1989. (Appendix A). The Supreme Court of Alabama overruled Petitioner's application for rehearing on May 5, 1989. (Appendix B).

The unreported opinion of the Alabama Court of Criminal Appeals was filed on March 4, 1988. (Appendix C). The Alabama Court of Criminal Appeals overruled Petitioner's application for rehearing on March 22, 1988. (Appendix D).

JURISDICTION

Final judgment in this matter was entered on May 5, 1989. By order of this Court dated June 29, 1989, the time

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for filing this petition was extended until August 3, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Eighth Amendment to the United States Constitution which provides that: "Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unsual punishments be inflicted."

2. The Fourteenth Amendment to the United States Constitution which provides that: "No state shall...deprive any person of life, liberty or property without due process of law."

3. § 13A-5-39, Code of Alabama which provides: "As used in this article, these terms shall be defined as follows:...(5) Murder and murder by the defendant. Shall be defined as provided in § 13A-5-40 (b)."

4. § 13A-5-40 (a), Code of Alabama, which provides: "The following are capital offenses:...(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant."

5. § 13A-5-40 (b), Code of Alabama which provides that:

> "...the term 'murder' and 'murder by the defendant' as used in this section to define capital offenses mean murder as defined in § 13A-6-2 (a) (1), but not as defined in § 13A-6-2 (a) (2) and (3). Subject to the provisions of § 13A-5-41, murder as defined in § 13A-6-2 and (3), as well as murder defined in § 13A-6-2 (a) (1), may be a lesser included offense of the capital offense defined in subsection (a) of this section."

6. § 13A-6-2 (a), Code of Alabama which provides that:

"A person commits the crime of murder if:

"(1) With intent to cause the death of another person, he causes the death of that person or of another person; or

"(2) Under circumstances manifesting extreme

indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or

"(3) He commits or attempts to commit...robbery in any degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he or another participant, if there be any, causes the death of any person."

STATEMENT OF THE CASE

Petitioner, Gary Leon Brown, was tried in the Circuit Court for Jefferson County, Alabama for the capital offense of "robbery or attempt thereof when the victim is intentionally killed by the defendant." § 13A-5-40 (a) (2), Code of Alabama. Under Alabama law, the requisite intent to kill could not be supplied by proof of reckless indifference to human life, [§ 13A-6-2 (a) (2)], or the felony murder doctrine, [§ 13A-6-2 (2) (3)]. § 13A-5-40 (b), Code of Alabama. Brown was found guilty of the charged capital offense and sentenced to death.

Essentially, the State of Alabama's theory of prosecution for the charged capital offense was that on May 26, 1986, Brown and other individuals went to a Jack McGraw's trailer, robbed him and, in the course thereof, intentionally killed him by stabbing him.[1] Two other individuals, James Bynum and Archie Bankhead were also charged. A fourth person, Jimmy Davenport, who drove Bynum, Bankhead,

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[1] A county medical examiner/coroner, performed an autopsy on the body of Jack McGraw. He opined that McGraw died as a result of bleeding secondary to multiple stab wounds. (R. 530). The autopsy revealed that McGraw's carotid artery and jugular venous complex had been severed. (R. 523). The medical examiner testified that the cut of the carotid artery and the jugular venous would have been rapidly fatal. (R. 533). In addition, he found fourteen other wounds to the neck area. (R. 522). On

and Brown to and from McGraw's trailer, was not charged. The evidence at trial indicated that all four had been drinking heavily and that Brown was drunk. (R. 564, 565, 577, 709, 715).

Three pretrial statements by Brown were introduced, over objection, at trial. In a July 17, 1986, statement, Brown admitted stabbing McGraw in the back with a pocketknife. (R. 1182). According to Brown's statement, Bynum was the one who cut McGraw's throat. (R. 1182). The statement indicated that Brown, Bankhead and Bynum had planned to go to McGraw's trailer to steal his money or belongings. (R. 1181).

The prosecution called Jimmy Davenport as a witness. Immediately prior to trial, Davenport changed his story after having been interrogated for two hours by the two prosecutors, Mike Anderton and Bob McGregor. (R. 549-552, 558-638).

Davenport was interviewed by deputies of the Jefferson County Sheriff's Department shortly after the date of McGraw's death. At that time Davenport indicated that he had heard nothing about any plans to kill McGraw on the way to the trailer or any discussions about the killing at Bankhead's house afterwards. (R. 607). Davenport apparently had testified similarly before the Jefferson County grand jury. (R. 601-602). Shortly before trial, Davenport received a call from Assistant District Attorney Anderton. (R. 594). Davenport did not relate anything different to Anderton over the telephone. (R. 594-595). Anderton arranged airfare for Davenport to fly to Birmingham. (R. 595). Anderton called Davenport when he got to Birmingham and arranged a meeting at the District Attorney's office on Sunday, February 6, 1986, the day before commencement of the trial. (R. 597). Anderton and Deputy District Attor-

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examining McGraw's back, he found a total of fifty-nine stab wounds between .4 to .5 inches long; the deepest being two inches deep. (R. 528). He testified no one of the stab wounds to the back would have been fatal and that even in combination would not have been rapidly fatal but only fatal if allowed to bleed over an extended time. (R. 529, 532-533).

ney McGregor interrogated Davenport at the District Attorney's office for two hours. (R. 549). At the time, Davenport was only twenty-one years old. (R. 635). Anderton and McGregor played "good guy/bad guy" with Davenport. (R. 598). Davenport related the same information to the two prosecutors over and over. He denied hearing any conversation about killing McGraw on the way to the trailer ten to fifteen times. (R. 597). McGregor began cursing Davenport. (R. 598). McGregor referred to McGraw as "queer," used the word "shit" repeatedly, and told Davenport what he wanted. (R. 598). McGregor said "come on"; "I want the truth"; "We know that there was a conversation"; "We know you heard it"; "Now, we can make a case against you"; "Right now, we're not going to, but we can—we could make the case. We could charge you with this capital murder"; "By all rights we ought to charge you, but we're not going to. You all were involved." (R. 599, 608). One of the prosecutors then said, "We have got a statement here, it was James's idea to go over there. And if the guy gave them any trouble, you'd just hit him in the head, and they answered that they would." (R. 608-609). In the face of all this, Davenport still said that he had not heard talk about killing McGraw on the way to McGraw's trailer. (R. 608-609). McGregor shouted: "Well, did they say they wanted to go over there to some queer's house?"; "All right. Come on. Come on. I want to hear the details about it"; "Well, to get a blow job to get some money." (R. 610-611). Davenport gave in and said "Well, said they're going to the queer house to do a job" and that was all he could remember hearing. (R. 611). McGregor replied in a loud voice: "Bullshit. Bullshit." (R. 611). Eventually, McGregor and Anderton wore Davenport down and Davenport supplied them with a version of events which fit their need. (R. 600). McGregor told Davenport "I want you to stick with this truth." (R. 600). McGregor told Davenport that a "big fat man" was going to cross examine him. The record indicates that Brown's trial counsel was overweight. (R. 266). (R. 600). McGregor told Davenport: "He is going to be in your face"; "He's going to tear you a new asshole"; "If you don't stick to this new truth." (R. 600). One of the prosecu-

tors asked Davenport if he knew what perjury was and told him that he would be charged with perjury if he did not testify in line with the "new truth." (R. 601-602).

At trial, Davenport testified as desired by McGregor and Anderton. As to the trip to McGraw's trailer, Davenport said that on the evening of May 26, 1986, he drove Archie Bankhead, James Bynum and Gary Brown to McGraw's trailer. He claimed that on the way to McGraw's trailer, he heard the others talking about "killing a queer." (R. 567). He also claimed that he heard Gary Brown and Bankhead asking Bynum "how hard he could hit." (R. 570). Davenport said that Gary Brown asked Bynum if he could "knock the old man out." (R. 570). Davenport said that Bynum replied that he could and that Gary Brown replied "Well, if you can't, I can." (R. 570). Davenport related that he did not relate this information earlier because he was afraid he would be charged. (R. 587).

A motion for a mistrial based upon the conduct of the prosecutors was denied by the trial court. (R. 620). At the conclusion of cross examination of Davenport, the prosecution was allowed to play a tape of the interrogation of Davenport over objection. (R. 621-628). Prior to any testimony by Davenport, Brown's counsel objected and moved that the case be continued or that a mistrial be declared. (R. 553). The trial court overruled that motion. (R. 555).

Brown was found guilty as charged and sentenced to death. Davenport's testimony was referenced in the prosecution's closing arguments in both the guilt/innocence and life/death phases of the trial and in the trial court's sentencing order. (R. 902-904, 1183).

On appeal to the Alabama Court of Criminal Appeals, Petitioner raised as an issue whether the trial court erred in admitting Davenport's statement which was not shown to be voluntary. In affirming, the Alabama Court of Criminal Appeals concluded that Petitioner was "[i]n essence,... trying to assert Davenport's Fifth Amendment and *Miranda* rights and held that his argument failed because [he] ha[d] no standing to assert a third party's rights." The Alabama Court of Criminal Appeals overruled Petitioner's applica-

tion for rehearing. On certiorari to the Supreme Court of Alabama, the Supreme Court of Alabama affirmed, holding that a "review of the record, arguments, and briefs of counsel reveals no error affecting his rights." The Supreme Court of Alabama overruled Petitioner's application for rehearing.

REASONS FOR GRANTING THE WRIT

The decision below raises an important federal question of whether a death sentence may be constitutionally imposed when evidence pertaining to an element of a capital offense was procured through coercive prosecutorial interrogation tactics.

The early judicial prohibitions of the use of involuntary confessions turned in part on their inherent untrustworthiness. See, *Spano v. New York*, 360 U.S. 315, 320 (1959). See generally, 3 Wigmore, *Evidence*, Section 822 (Chadbourn rev. 1970). In *Brown v. Mississippi*, 297 U.S. 278 (1936), this Court held that use of involuntary confessions violates the due process clause of the Fourteenth Amendment.

To be sure, in a noncapital case, this Court has held that "the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses." *United States v. Nobles*, 422 U.S. 225 (1975). However, because there is a qualitative difference between death and any other permissible form of punishment, there is a heightened need under the Eighth and Fourteenth Amendments for reliability in the determination that death is the appropriate sentence in a particular case. *Zant v. Stephens*, 462 U.S. 862 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). "Since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court's decisions have made it clear that States may impose this ultimate sentence only if they

follow procedures that are designed to assure reliability in sentencing determinations." *Barclay v. Florida*, 463 U.S. 939 (1983) (Stephens, Powell, J., concurring). Further, as a matter of due process under the Fourteenth Amendment, that same reasoning applies to the guilt determination, i.e. the risk of unwarranted convictions must be avoided. *Beck v. Alabama*, 447 U.S. 625 (1981) (As a matter of due process, a sentence of death may not be constitutionally imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of a lesser included noncapital offense and when the evidence would have supported such a verdict because of an enhanced risk of unwarranted convictions which cannot be tolerated when a defendant's life is at stake.).

On appeal to the Alabama Court of Criminal Appeals, Petitioner raised as an issue whether the trial court erred in admitting Davenport's statement which was not shown to be voluntary. In affirming, the Alabama Court of Criminal Appeals concluded that Petitioner was "[i]n essence, ... trying to assert Davenport's Fifth Amendment and *Miranda* rights and held that his argument failed because [he] ha[d] no standing to assert a third party's rights." On certiorari to the Supreme Court of Alabama, the Supreme Court of Alabama affirmed, holding that a "review of the record, arguments, and briefs of counsel reveals no error affecting his rights." However, Petitioner maintains that an application of the aforementioned principles pertaining to evaluation of death penalty cases indicates the necessity of examining whether the utilization of coerced evidence offends not so much the Fifth Amendment rights of a witness but the Eighth and Fourteenth Amendments' heightened need for reliability in sentencing and the Fourteenth Amendment's need for the avoidance of unwarranted convictions.

It is without dispute that a conviction obtained through the use of perjured testimony is violative of due process of law. *Mooney v. Holohan*, 294 U.S. 103 (1935). Where a witness's statement and testimony have been coerced, its trustworthiness and truthfulness are suspect. The use of such statements and testimony creates an unacceptable

risk that a conviction might be obtained based upon perjured testimony.

Just such an unacceptable risk was injected into this case through the prosecutors' use of Jimmy Davenport, whose testimony related directly the element of whether Petitioner "intentionally killed."[2] The interrogation of Davenport on the very eve of trial was unquestionably coercive. The prosecutors played "good guy/bad guy" and used profanity and threats to intimidate Davenport. Further, once they extracted a version of events suitable to them, they threatened Davenport with prosecution for perjury if he recanted and said what he had said all along. (R. 594-635). Thus, there was a risk that his statement was not true and that testimony at trial was not true. The risk of the jury's reliance upon Davenport's testimony and statement as evidence of an intent to kill was exacerbated by the fact that the two interrogators were prosecutors. Cf. *Berger v. United States*, 295 U.S. 78 (1935) ("It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry weight against the accused when they should properly carry none.) This risk violated the Eighth and Fourteenth Amendments' heightened need for reliability in the sentencing determination and the Fourteenth Amendment's need for avoidance of an unwarranted conviction. Petitioner therefore urges this Court to review his conviction and sentence of death and address this issue.

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[2]Under Alabama law, the requisite intent to kill could not be supplied by proof of reckless indifference to human life, [§ 13A-6-2 (a) (2)], or the felony murder doctrine, [§ 13A-6-2 (2) (3)]. § 13A-5-39, Code of Alabama. § 13A-5-40 (b), Code of Alabama.

CONCLUSION

For the foregoing reasons, Petitioner, Gary Leon Brown, respectfully requests this Court to grant his Petition for Writ of Certiorari to the Supreme Court of Alabama.

Respectfully submitted,

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Gary Leon Brown

Appendix A

THE STATE OF ALABAMA–JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1988-89

Ex parte Gary Leon Brown

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Gary Leon Brown

87-802 v.

State)

(Jefferson Circuit Court, CC-86-03115)

STEAGALL, JUSTICE.

Gary Leon Brown was convicted of capital murder, Ala. Code 1975, § 13A-5-40 (a) (2), for the stabbing death of Jack McGraw during a robbery of McGraw's trailer. The trial court accepted the jury's advisory death sentence and sentenced the defendant to death. The Court of Criminal Appeals affirmed.

Although petitioner raises several issues on appeal, a thorough review of the record, arguments, and briefs of counsel reveals no error adversely affecting his rights. Therefore, the judgment of the Court of Criminal Appeals is due to be, and it is hereby, affirmed.

AFFIRMED.

Hornsby, C.J., and Maddox, Almon, Shores, Adams, Houston and Kennedy, J.J., concur.*

*Filed March 10, 1989

Appendix B

THE STATE OF ALABAMA–JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
May 5, 1989

87-802
Ex parte Gary Leon Brown
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Gary Leon Brown v. State)

(CRC 6/316 (Jefferson CC-86-03115))

ORDER

IT IS ORDERED that the application for rehearing filed in the above cause on March 23, 1989, be, and the same is hereby, overruled. NO OPINION.

STEAGALL, J. — Hornsby, CJ., Maddox, Almon, Shores, Adams, Houston and Kennedy, JJ., concur.

Appendix C

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1987–88

6 Div. 316

Gary Leon Brown
v.
State

Appeal from Jefferson Circuit Court

TYSON, JUDGE

Gary Leon Brown was indicted for the capital offense of the murder of Jack McGraw during a robbery in violation of §13A-5-40(a)(2), Code of Alabama 1975. The jury found the appellant "guilty of capital murder as charged in the indictment". After punishment phase of the trial the jury returned an advisory verdict for death by a vote of ten "for death" and two "for life without parole". At the sentencing hearing the trial judge upheld the jury's advisory verdict by sentencing the appellant to death by electrocution.

Walter James, Jr., cousin of the victim, testified that he last saw the victim in December of 1985. James at that time did not notice any physical ailments or obvious physical deformities to the victim.

Chris Mitchell, a 13 year old, stated that when he knocked on the victim's door he saw the victim lying face down inside his trailer near the door. Mitchell and the three boys that he had been playing with went to Johnny Harris' house and told his parents.

James Harris, father of Johnny Harris, and two of his

neighbors then went to the victim's trailer. Harris testified that they did not disturb anything but just looked through the glass door and saw the victim's body. Harris called the sheriff's department.

Harris stated that the victim's trailer was located in Pinson, Alabama.

Two officers of the Jefferson County Sheriff's Department testified as to securing the crime scene at the trailer and then turning it over to Ted Williams, evidence technician, without the same being disturbed except for one officer checking to make sure the victim was dead.

Ted Williams photographed and sketched the scene. Williams identified numerous exhibits which he had collected from the victim's residence.

Sgt. Don Gaskey of the Jefferson County Sheriff's Department stated that on May 30, 1986, he went to the home of Blanche Bankhead. From the backyard of the Bankhead residence Gaskey collected pieces of clothing from an area that appeared to have been burned.

Witnesses who handled the chain of possession and who also tested certain items of evidence testified accordingly.

Steve Dexler, a trace analyst with the Alabama Department of Forensic Sciences, examined burned materials found in the backyard of the Bankhead home. Three portions of the burned material were "consistent with material coming from clothing." (R. 499) Two metal fragments were "consistent with speed-lacing eyelets off of footwear." (R. 500)

Dr. Robert Brissie, chief coroner and medical examiner for Jefferson County, performed the autopsy on the victim. Dr. Brissie found several stab wounds to the head and a contusion to the back of the victim's head. Dr. Brissie's opinion was that there were "at least fifteen or sixteen cuts" to the neck including those that "cut down through the carotid artery and the jugular venous complex." (R. 522, 523) On examining the victim's back from the base of the neck downward to the base of the shoulder blades 59 stab wounds were found by Dr. Brissie. "Many of these stab wounds were notched, an appearance most consistent with

a suspect weapon having its position altered or twisted at the time of stabbing." (R. 528) Several areas of the victim's body were bruised. In Dr. Brissie's opinion death was caused by bleeding to death from the stab wounds.

Jimmy Davenport testified that on May 26, 1986, he went fishing with his brother-in-law, James Bynum, Archie Bankhead and the appellant. While fishing, they were drinking beer and whiskey. All four men then went to Chuck and Willie's Lounge to play pool and drink. The four men left the lounge together with Davenport doing the driving.

Davenport stated that he heard them say "something about going and killing a queer, or something like that." (R. 567) They (Bankhead and the appellant) both were asking Bynum:

> "'How hard can you hit?' And, you know, James was saying, 'Pretty hard.' And I guess—I think Gary asked him, 'Well can you knock this old man out?' And James said, 'yes', he could. And then Gary said, 'Well, if you can't, I can', or something like that. And that's about it." (R. 570)

Bynum gave Davenport directions to the victim's trailer. Bynum, Bankhead and the appellant went up the victim's trailer [sic] and knocked on the door. The victim opened the door and let them come inside. A short time later all four came back outside the trailer. Bankhead grabbed the victim around the neck in a "headlock". Bynum and the appellant were hitting the victim. (R. 571) Bankhead, Bynum and the appellant picked the victim up and carried him inside the trailer. Davenport observed this while sitting in his car.

Davenport did not see the victim after the altercation. When Bynum, Bankhead and the appellant came out of the trailer, they were carrying items. Davenport observed blood on all three men. The back seat was so full of items from the victim's trailer that the appellant rode in the trunk to Bankhead's house.

The stolen items were taken into Bankhead's residence.

Davenport could not remember vel non if he helped carry the items into the house.

Davenport testified that Bankhead gathered all four of their shirts, the appellant's pants and Bankhead's pants and burned them in the backyard. The reason for burning the clothing was that it had blood on it. Davenport stated that he had blood on the shoulder of his shirt because Bankhead had brushed Davenport's shirt when he got into Davenport's automobile.

A wallet was seen by Davenport in Bankhead's kitchen. Davenport received some of the money which the wallet contained.

On cross-examination Davenport admitted that he had not told the grand jury about seeing the wallet in question, Bankhead's burning Davenport's shirt, or statements made by the three men on the way to the victim's house.

The day before the jury for this trial was struck, Davenport talked with Mr. Anderton and Mr. McGregor, assistant district attorneys. After being asked several times, Davenport admitted overhearing statements made on the way to the victim's trailer. Davenport indicated that Anderton had told him that a case could be make against Davenport, but right now they were not going to charge Davenport with any crime.

Davenport stated that no conversation took place at Bankhead's house because they did not want Bankhead's wife to overhear them.

After cross-examination the prosecution made a motion to require that the taped interview between the prosecutors and Davenport be played for the jury. The reason for this was that the tape would be played instead of rehabilitative testimony, due to the fact that there had not been a typed transcript made of this taped interview. The trial judge gave instructions to the jury that the reason he was allowing the tape to be played was to let the jury determine the circumstances under which Davenport gave this changed testimony and the credibility to give to Davenport as a witness.

Blanche Bankhead stated that in May of 1986, she was

married to Archie Bankhead. On the night of May 26, 1986, her husband, Davenport, Bynum and the appellant came to the Bankhead home. Her husband, Davenport, and the appellant had blood on all of their clothes and arms and Bynum had blood on his shirt.

A microwave oven, a television and a stereo with speakers were brought into her home by Bynum, Davenport, Archie Bankhead and this appellant, Brown.

Blanche then went into the bedroom and overheard the following conversation:

> "Archie said, 'Are you sure he's dead? Are you sure you killed him, Gary?'
>
> "Response was, 'I kept stabbing and stabbing and stabbing and stabbing.' Archie again said, 'Yes, but are you sure he's dead?' and Gary said, 'No, because then when we was getting the stuff out, he began to get up.' And Bantum [sic] [Bynum] had said 'Archie handed the butcher knife to me said we have to kill him'...he said he [Bynum] 'sliced his throat.'" (R. 651-652) Davenport then said, "I can't believe y'all done this. I've got to get out of here. Get the stuff out of my car." (R. 652)

Blanche testified that she then heard them look for money in a wallet and split the "sixty something dollars" they found in this wallet. (R. 653) Archie later said, "We've got to take all our clothes off, we've got to burn them. We'll go burn them outside, even our shoes." (R. 654)

The appellant, Brown, then went to a local store and bought some beer.

When the men were in the back yard with the fire, Blanche saw Archie's pocket knife in a pan of water on the stove. Blanche later found this knife behind the stove and turned it over to Sgt. White.

Later that night Blanche overheard her husband and the appellant loading stuff in a car and leaving.

On cross-examination Blanche admitted that in the

statement she gave the police on May 29, 1986, the only conversation which she stated she overheard was concerning the burning of something. As to several other details in her May 29 statement, Blanche testified such must have been typed incorrectly.

Sgt. Eddie White, detective for the Jefferson County Sheriff's Department, stated that a knife and an iron skillet were found in the victim's kitchen sink. The bottom of the skillet was missing. An antenna wire was hanging from the den ceiling and had been cut.

On May 29, 1986, Sgt. White first talked with this appellant. At the Center Point Sheriff's Office, Sgt. White recorded his questioning of the appellant. The appellant was advised of his constitutional rights both verbally and in writing before any questioning began. Sgt. White read most of the transcript of this taped session for the jury.

In the first statement given by the appellant on May 29, 1986, he stated that on May 16, 1986, he and Bynum went to the victim's trailer and they stole a VCR and some checks. Bynum then cashed two or three checks from the victim's checkbook. The appellant stated that this was the last time he had been to the victim's residence.

On May 26, 1986, the appellant, Brown, told Sgt. White that, together with Archie Bankhead, Davenport, and Bynum, he went to Chuck and Willie's Lounge around 6:30 p.m. and stayed approximately two hours. After leaving the lounge they went over to Bankhead's house to watch television.

After making this statement, the appellant then directed to the place where Bynum was living. Bynum then made a statement to the police.

Upon returning to the Center Point Sheriff's Office that night, the appellant gave another statement. This statement was played for the jury.

In this second statement the appellant admitted going to the victim's trailer on May 26, 1986. Davenport had stayed in the car while Bynum, Bankhead and the appellant, Brown, went into the Victim's residence. A short time later four men, including the victim, McGraw, came outside

the trailer. As they were walking, Bankhead grabbed the victim around the neck and choked the victim until he passed out. The appellant stated that Bynum and Bankhead then carried the victim inside the trailer. Bankhead told them they could not let the victim live because he could identify them. Bankhead took out his pocket knife and stabbed the victim a few times in the back. The appellant, Brown, did not see Bankhead cut the victim's throat. From the victim's residence Bankhead, Bynum and the appellant then stole some beer, two television sets, two stereos, a microwave, a checkbook and a wallet. A towel was used to wipe off their fingerprints. The appellant got into the trunk of Davenport's vehicle because the back seat was full of stolen items.

At Bankhead's house all the stolen items were taken into the house. The victim's checkbook and wallet and the four men's outer clothing were then burned in Bankhead's backyard.

Davenport and Bynum left after splitting up the money found in the wallet. Bankhead and the appellant, Brown, later loaded up the stolen items and stored them at someone else's house overnight.

The appellant said the reason he did not remember things that clearly was because he was drunk.

A third statement from the appellant was given July 17, 1986, in the Jefferson County, Alabama Jail. The reason a third statement was taken from the appellant was that the appellant asked his mother to contact the police and have someone come talk to him concerning this case. The appellant did not request that his attorney be present. The tape recording of this statement was also played for the jury.

The appellant in this statement said that Bynum had suggested that they go to the victim's trailer and steal some things. Davenport stayed in his automobile while Bankhead, Bynum and the appellant, Brown, went into the victim's trailer. When they started to leave the trailer, Bankhead grabbed the victim from behind and choked the victim while Bynum was hitting the victim in the face. After they dragged the victim inside the trailer, the victim made a moaning

sound. Bankhead told the appellant that they had to kill the victim. Bankhead handed the appellant a brown pocket knife with a three inch blade. Bankhead went into the kitchen and returned with a large object which the appellant later found was an iron skillet. Bankhead told the appellant that he had to kill the victim. The appellant jumped on the victim's back and started stabbing him. The appellant stated that he was afraid of what Bankhead might do to him. The appellant admitted to stabbing the victim "quite a few times". Bankhead said the pocket knife was not going to get it and hit the victim in the head with the iron skillet. Bynum then said he would get the victim and cut the victim's throat with a butcher knife from the victim's kitchen. All three men carried items from the victim's residence to Davenport's vehicle.

Bankhead, Bynum and the appellant pulled off their shirts and pants and burned them in Bankhead's backyard.

At this point the State rested its case.

The appellant called Archie Bankhead to testify but he refused to do so. The appellant offered no other evidence.

At the sentencing hearing, after the jury returned a verdict of guilty of capital murder, the prosecution called Sgt. White again to identify two pictures. One picture depicted the ground outside the victim's trailer and showed several areas of blood on the ground. The other picture showed how Sgt. White first observed the victim lying face down in a large area of blood, just to the left of the entrance of the trailer.

On cross examination Sgt. White stated that the appellant "indicated to me that he realized that he had committed a very heinous crime...and he was regretful of that." (R. 972)

Dr. Brissie testified that all stab wounds to the head, neck and back were ante-mortem wounds which would have caused tremendous pain if the victim were conscious. Seventeen pictures showing the victim's wounds and bruises were admitted as evidence during Dr. Brissie's testimony. Also slides were shown to the jury showing the wounds and bruises on the victim. Dr. Brissie stated that, if a person is

unconscious and still has brain function, he would usually react to pain.

The appellant called several witnesses who testified to the appellant's good character.

The jury, by a ten-to-two vote, recommended death. Following further proceedings before the trial court, the trial judge found two aggravating and no mitigating circumstances. After the sentencing hearing, the trial judge upheld the jury's advisory verdict and fixed punishment at death by electrocution.

I

The appellant contends that the trial court erred in denying the motion by counsel to suppress the statements made by this appellant.

First, the appellant asserts that the statements were improperly induced and, therefore, not voluntary because Sgt. Harris stated to the appellant during the three conversations that: "Oh, I am sure I told him it would be a lot better for him if he went ahead and leveled with us, but I didn't make him no [sic] promises to get him out of anything." (R. 119) It is unclear from the record exactly when this statement by Sgt. Harris was made to the appellant.

In *Eakes v. State*, 387 So.2d 855, 859 (Ala.Cr.App. 1978) this court stated:

> "[a] promise or judgment for a confession cannot be implied from an exhortation to a prisoner that it is best or better to tell the truth."

See also *Ellis v. State*, 398 So.2d 402 (Ala.Cr.App. 1981); *Wallace v. State*, 290 Ala. 201, 275 So.2d 634 (1973).

Sgt. Harris' remarks were to convey the thought that he would tell the truth. These remarks do not imply a promise or inducement to confess.

Secondly, the appellant's counsel argues that the appellant's statement on July, 17, 1986, should have been suppressed because the appellant's right to an attorney was violated.

The appellant's counsel had been appointed on June 17,

1986, and this counsel had also been to the jail and talked with the appellant.

Sgt. Harris testified, on voir dire and outside the presence of the jury, that the appellant's mother on July 17, 1986, had contacted him and stated that the appellant wanted to make another statement. At the suppression hearing Sgt. White testified that Sgt. Brown told him that the appellant's mother had called Harris and informed Harris that the appellant wanted to make another statement. As a result of that request, White went to the jail and read the appellant his *Miranda* rights before taking this statement. The appellant indicated that he understood those rights, and the appellant signed the *Miranda* rights waiver form. This form was admitted as evidence. White testified that he made no threats or promises or other inducements to the appellant and no violence or coercion was applied. White acknowledged that he made no attempt to find out if the appellant had an attorney prior to taking this statement. During cross-examination White stated that, "if he [the appellant] had requested that you be there, I would have notified you [appellant's counsel]". (R. 835)

> "The fact that a defendant has an attorney does not mean, as a per se rule, that law enforcement officials cannot procure a statement of any kind from the defendant without prior notice to, if not the consent of, the attorney."
>
> * * *
>
> "There being no per se or technical violation by not having the retained or appointed counsel of an accused present during an interrogation prior to indictment, we must resolve the question of the possibility of any constitutional violation by looking to the facts of each particular case."

Thompson v. State, 347 So.2d 1371, 1376 (Ala.Cr.App.), writ. denied, 434 U.S. 1018, 98 S.Ct. 740, 54 L.Ed.2d 765 (1978).

Because there was no per se violation in this cause, the issue becomes whether vel non the appellant knowingly, willingly and understandingly waived his right to counsel. We have carefully reviewed the record and considered the following factors:

(1.) the appellant's counsel had talked with the appellant before he gave his third statement on July 17, 1986;

(2.) the taking of the statement was initiated by the appellant, through his mother contacting Sgt. Harris;

(3.) the appellant was advised of his *Miranda* rights before the statement was taken;

(4.) the appellant acknowledged he understood his *Miranda* rights and signed rights waiver form;

(5.) undisputed testimony that no violence or coercion was applied to the appellant;

(6.) undisputed testimony that Sgt. White made no threats or promises or other inducement to the appellant prior to taking the statement from the appellant.

Upon review of these facts, we are convinced that the appellant knowingly, willingly and understandingly waived his right to have counsel present during this statement on July 17, 1986.

Therefore, having reviewed the entire record, this court holds that the trial court properly denied the motion to suppress the statements made by this appellant.

II

The appellant's counsel maintains that the trial court erred in denying the appellant's motion for a mistrial based upon the admission of the appellant's statement which contained evidence of another crime.

The first statement which the appellant gave on May 29, 1986, was read to the jury with parts of the statement being omitted. On a prior occasion, Bynum and the appellant had stolen the victim's VCR and some checks. This information was volunteered by the appellant when Sgt. White was questioning the appellant concerning how the appellant knew the victim, McGraw, and when he had last

seen the victim.

In *Sims v. State*, 253 Ala. 666, 669, 46 So.2d 564 (Ala. 1950), the court states:

> "[A] good statement of the rule is that if the confession indicates that accused has committed a separate offense it should be excluded by the court if its separation is possible, leaving the balance intelligible, unless it tends directly to prove accused guilty of the crime charged, or the motive for its commission, or *where such part tends to explain the remaining portion of the confession.*" (citations omitted) (emphasis added)

See C. Gamble, *McElroy's Alabama Evidence* § 12.02 (3d.ed. 1977).

In the first confession of this appellant, the part mentioning the prior crime explained how the appellant knew the victim and how the appellant knew where the victim lived. The deletion of the prior crime was not possible because it would have made this part of the confession out of context and difficult to understand.

III

The appellant's counsel argues that the trial court erred in admitting a taped interview of Davenport which was not shown to be voluntary.

In essence, the appellant is trying to assert Davenport's Fifth Amendment and Miranda rights.

> "[T]he Fifth Amendment privilege against compulsory self-discrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. *United States v. Nobles*, 422 U.S. 225, 234, 95 S.Ct. 2160, 2168, 45 L.Ed.2d 141 (1975). The Fifth Amendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him. *Nobles*, 422 U.S. at 233, 95 S.Ct. at 2167. In any event, the Fifth Amendment privilege against compulsory self-incrimination provides no

protection for the commission of perjury. *United States v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980)."

Moulds v. State, 426 So.2d 942, 948 (Ala.Cr.App. 1982).

This argument fails due to the fact that the appellant has no standing to assert a third party's rights.

Hence, the trial court did not err in admitting the taped interview of Davenport as to its voluntariness.

IV

The appellant contends that the trial court erred in refusing to allow the appellant to play all of Davenport's interview once part of it had been played.

After playing most of Davenport's interview the following occurred:

"THE COURT: Let me make a suggestion: The purpose in allowing this to be played has been well accomplished. Let's get down to questions and answers.

"MR. MCDONALD: They entered — I think the entire thing ought to be —

"MR. MCGREGOR: Whatever please the Court and Mr. McDonald.

"THE COURT: You want the rest of it played?

"MR. MCDONALD: Well, if they are going to put part of it in, I want to hear this sales pitch.

"MR. ANDERTON: I don't know, Judge. I don't remember. I think we are winding down, but I can't give you a time.

"THE COURT: Go on with your questions. And if Rusty [the appellant's counsel] wants to play the

balance in his examination, he can. Let's get back to questions." (R. 627-28) (emphasis added)

After this the appellant's counsel did not request that the rest of the tape be played. If any error occurred in not playing the entire tape during the redirect examination, this was waived when the appellant's counsel chose not to request that the remainder of the tape be played. See Rule 45, A.R.A.P.

Therefore, the appellant's contention that there was a refusal to play the entire tape is unfounded.

V

The appellant argues that the trial court erred in refusing to grant the appellant's motion for a mistrial or a continuance due to the fact that the taped interview with Davenport was not disclosed until the morning on which the trial started.

The appellant asserts that the assistant district attorney violated A. R. Crim. P. Temp. Rule 18 and the trial court's order concerning discovery by their failure to turn over to appellant's counsel the tape recorded interview with Davenport.

Davenport had moved to Texas several months before this case came to trial. On February 8, 1987, Davenport returned to Alabama to testify. On February 8, a Sunday afternoon, the two assistant district attorneys taped an interview which they conducted with Davenport. Davenport, during this interview, made some changes as to what happened on the night of the killing of McGraw from his previous statements and testimony. On February 9 the assistant district attorneys notified appellant's attorney of these changes in the story.

Based on these facts, the prosecutors promptly notified the opposing counsel of the additional evidence as required by A. R. Crim. P. Tem. 18.3.

The appellant's argument is based on *Young v. State*, 494 So.2d 862 (Ala.Cr.App.), cert. denied, 494 So.2d 862

(Ala. 1986). In that case the defense counsel did not learn of the additional statement made by the defendant until the police officer actually testified at trial even though the prosecutor knew about the statement prior to that time.

In this case the prosecutors informed appellant's counsel the morning after receiving the changes in Davenport's story. The trial judge delayed appellant's counsel's cross examination of Davenport until appellant's counsel had sufficient time to listen to the taped interview.

> "A motion for a continuance in a criminal case is addressed to the sound discretion of the trial court, the exercise of which will not be disturbed unless clearly abused."

Fletcher v. State, 291 Ala. 67, 68, 277 So.2d 882 (1973).

> "[T]he granting of a mistrial is within the sound discretion of the trial court, for he, being present, is in a much better position to determine what effect, if any, some occurrence may have upon the jury's ability to decide the defendant's fate fairly and justly. And we will not interfere with the trial judge unless there has been a clear abuse of discretion."

Curry v. State, 502 So.2d 836, 843 (Ala.Cr.App. 1986), cert. denied, 502 So.2d 836 (Ala. 1987). *Shadle v. State*, 280 Ala. 379, 194 So.2d 538 (1967).

We find no abuse of discretion in the trial judge's refusing to grant the appellant's motion for a mistrial or a continuance on this basis.

VI

The appellant's counsel maintains that the trial court erred when the prosecutor was allowed to impeach his own witness. The issue concerns a point when Davenport, called as a witness by the State, was being questioned by the prosecutor and the following occurred:

> "Q. Now, do you remember talking to Sergeant White, Sergeant Caskey?

"A. Yes, sir.

"Q. And is what you told them back in May of 1986 the same thing you told us today?

"A. No, sir.

"Q. Okay. What, if any, type differences are there?

"MR. MCDONALD: We object to this.

"THE COURT: Overruled.

"MR. MCDONALD: Impeaching one's own witness?

"THE COURT: Overruled.

"MR. MCDONALD: We except.

"THE COURT: Yes, sir, I understand.

"THE WITNESS: I didn't tell them about Archie burning my shirt and I didn't tell them about me seeing the wallet." (R. 585-586)

The appellant asserts that this constituted the prosecutor's impeaching his own witness.

Shepherd v. Southern Railway Company, 288 Ala. 50, 60, 256 So.2d 883 (1970), states:

"'Impeaching testimony' is that designed to discredit a witness, or to reduce the effectiveness of his testimony by bringing forth evidence to show why faith should not be accorded his testimony.

"Impeaching evidence is evidence designed to discredit a witness or to reduce the effectiveness of his testimony by attacking his character, motives, integrity or veracity."

Shroeder, Hoffman and Thigpen, *Alabama Evidence*, §6-1 (1987).

Under this definition above of "impeachment", the question by the prosecutor was not designed to "discredit this witness" or "reduce the effectiveness of his testimony" and, therefore, the prosecutor was not impeaching his own witness.

Accordingly, the trial court did not err in overruling the objection to the prosecutor's bringing out these matters.

VII

§ 13A-5-53, Code of Alabama (1981), requires this court to review the entire record for any errors adversely affecting this conviction and the propriety of this appellant's sentence of death by the trial court.

This court has reviewed the entire record in this cause as required by § 13A-5-53(a), Code of Alabama (1981), and we have found no error adversely affecting the substantial rights of this appellant. *Beck v. State*, 396 So.2d 645 (Ala. 1980); A.R.A.P. 45.

The trial court found the existence of two aggravating circumstances:

(1) "The capital offense was committed while the defendant was engaged...in the commission of...robbery." (§ 13A-5-49 (4)).

(2) "The capital offense was especially heinous, atrocious or cruel compared to other capital offenses." (§ 13A-5-49 (8)) (R. 1184)—See Appendix A, hereto attached.

The first aggravating circumstance is fully supported by this record.

We are convinced that this capital offense was especially heinous, atrocious and cruel. *Hubbard v. State*, 500 So.2d 1204 (Ala.Cr.App.), aff'd, 500 So.2d 1231 (Ala. 1986), cert. denied, *Hubbard v. Alabama*, ____ U.S.____, 107 S.Ct. 1591, 94 L.Ed.2d 780 (1987). The victim was 59 years old at the time of his death, lived alone, was unsuspecting and unarmed when overpowered by his three assailants. There was a total of 78 stab wounds to the body, with 16 to the

neck, 59 in the back and three to the face. A contusion to the back of the victim's head and several areas of abrasion were found on the victim's body. The most extensive injuries were to the neck where the carotid artery and jugular vein were severed. Dr. Brissie's opinion was that "all the wounds depicted were ante-mortem or prior to the decedent's death." (R. 1184) These facts support and sustain the finding of the second aggravating circumstance. See *Thompson v. State*, 503 So.2d 871, 882 (Ala.Cr.App. 1986), aff'd, 503 So.2d 887 (Ala. 1987), cert. denied, *Thompson v. Alabama*, ____U.S.____, 108 S.Ct. 204, ____L.Ed.2d____(1987).

The trial court found no statutory mitigating circumstances. The trial judge went through each mitigating circumstance as listed in §13A-5-51, Code of Alabama (1981).

The trial court considered the fine family of this appellant and the appellant's background and character. The trial judge's findings regarding the mitigating circumstances are supported by the record. See Appendix A.

We find no evidence in this record that the sentence was imposed under the influence of passion, prejudice or any other arbitrary fact. *Hubbard*, supra.

Our independent weighing of the mitigating circumstances and the aggravating circumstances convinces us that death was the proper sentence to be imposed in this cause.

Further, the sentence of death in this case is not disproportionate to the penalty imposed in similar cases considering the crime and this appellant. See *Beck v. State*, 396 So.2d 645, 654, n. 5, (Ala. 1980) (a great majority of sentences in Alabama are for robbery/murder).

We have carefully searched the record for plain error and found none. Therefore, the appellant's judgment of conviction and sentence of death is proper. The same is due to be and is, hereby, affirmed.

AFFIRMED.

All the Judges concur; Bowen, P.J. in result only.*

*Filed March 4, 1988

IN THE TENTH JUDICIAL CIRCUIT
OF THE STATE OF ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA
v.
GARY LEON BROWN

Case No. CC86 -3115

Order of the Court On Imposition of the Death Penalty*

Defendant Brown was charged by indictment with the capital offense of murder during a robbery in the 1st degree, 13A-5-40(2), wherein one Jack David McGraw was intentionally killed.

A petit jury duly impaneled and sworn as required by law, after hearing the evidence, the court's charge as to the applicable law, including the lesser included offense of felony murder and manslaughter found the defendant guilty of capital murder.

The same jury, sequestered throughout the entire proceedings, heard evidence, counsel's argument and the court charge during the "punishment" phase and returned an advisory verdict affixing the defendant's punishment at death.

The vote was ten for death and two for life without parole, as reflected in the verdict form and confirmed by individually polling the jury.

This court commends the respective attorneys for putting aside any attempt to emotionally influence the jury with passion, prejudice or other arbitrary factors in arriving at their advisory verdict.

The trial record abundantly supports the court's finding that the jury's advisory verdict was not imposed under the influence of passion, prejudice, or any arbitrary factor.

*Appended to the opinion of the Alabama Court of Criminal Appeals.

FINDINGS OF FACT FROM THE TRIAL

The court makes the following findings of fact from the evidentiary portions of the guilt phase trial proceedings:

The thrust of the state's case against defendant Brown was bottomed on Brown's inculpatory statement(s), the testimony of Jimmy Davenport and Blanche Bankhead, the wife of co-defendant Archie Bankhead.

Brown's statements—The court admitted into evidence, over objection, defendant's three inculpatory statements.

The suppression hearing record will best evince defendant's several objections to the admission of the defendant's statements.

The statements as a whole may be summarized thusly:

Defendant admits to a homosexual relationship with the deceased, the deceased paying money in exchange for Brown allowing the deceased to perform oral sex with Brown.

Brown states that he and his two co-defendants, Bankhead and Bynum, went to McGraw's trailer for the purpose of stealing his "money and some things."

At page 1 of his July 17, 1986 statement Brown states, "...James Bynum suggested that we go out to a man's house where we had been before and sit with him and drink with him and if he passed out take his uh, take his money and some things from his house and uh if he acted like he was mad that we were gonna knock him in the head and take his stuff uh so we, Jimmy didn't want a go and I made the statement that I didn't want a go because we had some money, you know, I told James that we, if we were gonna do that we should wait until some day when we didn't have any money but it was talked over and it was decided that we were gonna go out there anyway."

At page 2 defendant further states, "...but me and Archie and (inaudible) Bankhead and James Bynum went to the door because Jimmy was to stay in the car in case we needed to leave quickly or whatever, and the man invited us, we knocked on the door and the man invited us in and uh we walked in, all three of us walked in and he made the

statement that he didn't want to party that night because he had to go to work in the morning, that we needed to leave. Jack McGraw said that he didn't want to party that night, that he had to go to work in the morning, that we needed to leave, so I opened the door and walked out and James walked out behind me and Archie behind him and Jack was behind him and Jack was behind all of us, uh, I started walking toward the car and James followed me and Archie was, of course, following James. Uh, when we got right outside the trailer, Archie turned around and grabbed Mr. McGraw around the neck and started hitting him in the face and I turned around and was observing this at the time and I'm sure that Jimmy that was out in the car was observing it too and uh James hit the man in the face a few times while Archie still had him around the neck and uh they, Archie and the man fell in to the yard there about five feet from the entrance to the trailer and

At pages 3, 4 and 5 defendants states

"Q. O.K., what happened after his was drug back in to the trailer?

"A. After that, uh, somebody made the statement grab, grab some stuff, to get some stuff and at that time uh, I felt like the man was dead uh because of the choking and I assume that they did too uh .....

"Q. Talking about when Archie choked him?

"A. Right, when he, when he, after he got up from choking him I assumed that he was dead then, then, of course, like I said they grabbed him by the legs and drug him in to the trailer and I described where he was laying then. Uh, then as we started to grab some items the man made a noise, moaning noise. At that time, Archie grabbed his pocket knife and opened it up and handed it to me and said, "man, you got to kill him because he's gonna tell what we've done if you don't kill him", and I held out my hand and he handed me the pocket knife."

"A. Uh, but anyway, I, Archie handed me the pocket knife and I stood there and held it for a few seconds and he made the statement again, "man, you got to kill him, he's gonna tell on us if you don't kill him", then he went to the kitchen and grabbed , picked something up which I understand now to be a skillet but at the time I was not sure I just knew that he had a fairly large object in his hand so he ran to the kitchen and when he was on the way, it's only about five feet but as he turned around and was headed back toward me with the, whatever the object was, the large object, I jumped down on top of the man and he made the statement again, "man you got to kill him now, you know, damn it, you got to make sure he's dead, so I saw him standing there with the object and so I myself was afraid of what was uh what might transpire, I can't even say that I knew he was gonna hit me the the object he had in his hand but I had a feeling from the look in his eyes that he was uh, you know, I don't even know how to put it but I, anyway, I was scared that he, I I was scared of the whole situation from what had transpired as to what as was supposed to transpire when we went out there uh, that I was in a situation where I didn't know what was gonna be done to who at that point so I stabbed the man with the pocket knife several times and I looked back up at Archie and he was still holding the, what we know now was the skillet and uh I stopped stabbing the man and looked up and he said, "man, you, that pocket knife ain't gonna get it, you got to stab him, you got to kill him or he's gonna tell on us" so I turned around and stabbed the man some more, well then, he came and it the man over the head with the object which we know now was the skillet. Uh, at that time I quit stabbing him again because I, well I'm saying because I knew but I I assumed that surely that he was dead but then he made the statement again "that pocket knife ain't gonna get it, you're gonna have to stab him" so at that time James said, "fuck that pocket knife, I'll get him" so he ran in to the kitchen and came back with a butcher knife and cut the man's throat and when

I saw that happen I felt sure at that time that he was dead or was going to die so at that time I quit stabbing the man and got up and handed the, well at the point I'm not sure if I handed the pocket knife back to Archie or if I put in my pocket. Uh, I really don't know cause things were happening so fast, but at that time uh, Archie or James one made the statement, "get his stuff, we gotta get out of here" so I think I grabbed, I don't know what I grabbed but I grabbed an item from his house, carried it out to the car and I came back and James was washing his hands or he was washing, the water, he was washing something in the kitchen sink. I don't know if it was the butcher knife, his hands or both or what and uh I grabbed, grabbed something else uh and started to pick it up, well Archie was getting the beer out of the refrigerator, so anyway, we took the remainder of his stuff and loaded it in the car and uh the car was too full of stuff and they was all in there and I couldn't fit in so I said, they wanted to rearrange the stuff where we could all get in and I said, "no, never mind that, just put me in the trunk" so they opened the

"A. trunk up and locked me in, you know, put me in the trunk and I rode back to Archie's house in the trunk and when we got there uh, they let me out of the trunk and we took the stuff in his house, which we later on took to another place to hide and I guess that about concludes what we got to say."

At Bankhead's house Brown states that he and his companions burned their bloody clothing, boiled the pocket knife that was used to kill Mr. McGraw and foisted off the stolen appliances on mutual unsuspecting friends.

Davenport—Jimmy Davenport, the driver, testified that en route to McGraw's trailer the three defendants discussed killing the deceased, the defendant Brown inquiring of Bynum "can you knock this old man out?", Brown stating, "if you can't I can".

Further from Davenport, who stays inside the care but can see the trailer from his vantage point—the deceased allows, Brown, Bankhead and Bynum into his home for a brief period but soon escorts them out; the deceased was attached from behind by Bankhead; Bankhead grips McGraw's head in "headlock" or "half Nelson", defendants Brown & Bynum begin pummeling the deceased in the face with their fists; the deceased falls to the ground.

Witness Davenport describes Brown as "in front, slashing at his neck; the three defendants drag the prostrate body of the victim into the trailer.

One knows from Brown's statement quoted at length above that the defendants now begin to steal the defendant's housewares, monies, etc., and how the episode resulted in a knifing frenzy.

One knows from Brown's statement that having finished their butchery ~~with respect~~ to Mr. McGraw the assailants begin to load their vehicle with Mr. McGraw's personal items, filling their car so full of "boot" that Brown had to ride away loaded in the trunk of the vehicle.

Blanche Bankhead—was at home with her children when the three assailants arrived at the Bankhead home.

Mrs. Bankhead describes the defendant's carriage and speech moments after the murder—the defendants behaving at times in a jocular, cavalier manner. Mrs. Bankhead described Brown's bloody appearance and corroborates Brown's statement about burning the clothes and boiling the knife.

Technical people testified, coroner/medical examiner Robert Brissie, M.D. will be referenced below.

The defendant offered no testimony during the guilt phase (other than co-defendant Bankhead who invoked the Fifth Amendment).

CONCLUSION

The undersigned concludes that the jury's guilty verdict is well supported by the evidence presented at trial, that it

is virtually indisputable that Brown either intentionally killed the deceased during the course of a robbery or was a willing accomplice to the killing.

PUNISHMENT PHASE AND FINAL SENTENCING HEARING

At the punishment phase of this trial before the same jury as outlined above, the state was allowed to show aggravating circumstances and the defendant allowed to show mitigating circumstances.

Relative to aggravating circumstances the court finds that the state has proven beyond a reasonable doubt:

13A-5-49(4)

The capital offense was committed while the defendant was engaged...in the commission of a robbery.

The court, as previously stated, finds this aggravating circumstance to exist.

13A-5-49(8)

The capital offense was especially heinous, atrocious or cruel compared to other capital offense.

In addition to the factual findings above, the undersigned notes that the deceased was 59 years of age at his death, lived alone, was unarmed and unsuspecting of his assailants' foul purposes.

Dr. Robert Brissie, coroner/medical examiner, testified that the deceased received 16 incised wounds to the neck, 59 stab wounds in the back deep enough to allow probing, the deepest of which approximated 2.0 inches, three stab wounds to the face and an incised wound to the scalp were described by Dr. Brissie as well as extensive areas of abrasion and contusion consistent with the attack outside the mobile home.

The most extensive injuries observed by Dr. Brissie were to the neck, the carotid artery and jugular vein being severed. Dr. Brissie opined that the deceased was, in all probability, alive throughout the course of the homicidal acts—"all wounds depicted were anti mortem or prior to decedent's death."

The undersigned concludes that based on evidence and the applicable case law, this capital offense is in fact especially heinous, atrocious and cruel compared to other capital cases.

The court finds no other aggravating circumstances to exist.

Mitigating Circumstances

At the punishment phase before the jury, the defendant elicited from family members biographical data concerning the defendant and his character thru his adolescent years.

A school teacher in the county jail testified as to the defendant's skills in assisting prisoners with basic learning skills.

The jury was afforded the opportunity to independently assess the existence of each statutory mitigating circumstance referenced to 13A-5-51 (1 thru 7) plus the opportunity to find mitigation by way of 13A-5-52.

At the final sentencing hearing before the undersigned, a pre sentence report was submitted by Probation Services and admitted into evidence as were numerous letters from the defendant's family and friends supportive of a sentence of life without parole.

The defendant's family members, including mother, father, two sisters, a brother, neighbors, leaders of the Christian community that know the defendant's family all testified, supportive of a sentence of life without parole.

The court independently makes the following findings relative to mitigation:

§ 13A-5-51. Mitigating circumstances-Generally.

(1) The defendant has no significant history of prior criminal activity;

Does not apply. Out of the jury's hearing presence the defense conceded that this mitigating circumstance does not apply.

Defendant currently has a pending Robbery 1 degree (the capital offense for which defendant was convicted was committed while the defendant was on bond for Robbery).

Defendant has been previously been convicted of felony

VUACSA and sentenced to two years in state prison, Shelby County case #82422. Moreover, see pre sentence report re host of misdemeanor arrests and/or convictions.

(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

Does not apply. There is absolutely no evidence supportive of this circumstance. Defendant was housed at Taylor Hardin Secure Medical Facility from December 13, 1986 to January 30, 1987, pursuant to his plea of not guilty by reason of mental disease or defect (which was subsequently withdrawn).

The Lunacy Commission unanimously found no evidence of mental or emotional problems that would have contributed to the defendant's commission of the capital offense. The entire record from Taylor Hardin has been made part of the record in these proceedings.

There is no evidence of any prior mental or emotional disturbance for which defendant was treated by a professional.

(3) The victim was a participant in the defendant's conduct or consented to it;

Does not apply.

(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;

Does not apply. The evidence is to the contrary. Defendant Brown admitted inflicting the vast majority of stab wounds to the deceased.

Defendant Brown was integrally involved in the planning of the robbery. Defendant Brown was the best known assailant to the deceased, having engaged in homosexual acts with the deceased, having stayed overnight at the deceased's house on prior occasions.

(5) The defendant acted under duress or under the substantial domination of another person;

Not supported by the evidence. The court is mindful defendant Brown, at page 4 of his July 17, 1987, confession states that he was, in effect, afraid that co-defendant

Bankhead would do him bodily harm if he didn't do as Bankhead told him.

Neither Brown's statement in this regard nor any other evidence adduced at any phase of this proceeding support the existence of this mitigating circumstance.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

Does not apply. The undisputed evidence adduced at trial was that Brown had ingested beer and alcohol over the course of some hours preceding this killing.

Brown attributes his demonic behavior to drug abuse in his interviews with the medical people at Taylor Hardin.

Further, the same sentence report confirms Brown's long standing alcohol and substance abuse.

Based on the evidence adduced at trial including Brown's statements, the testimony of Jimmy Davenport and Blanche Bankhead the court finds that the savageries committed by the defendant are not mitigated by the defendant's ingestion of alcohol and or drugs on the day of the offense or by way of the defendant's long time substance abuse.

(7) The age of the defendant at the time of the crime.

Does not apply. Defendant was 27 at the time of the offense, date of birth July 14, 1958.

§ 13A-5-52. Same—Inclusion of defendant's character, record, etc.

I would be remiss if I did not comment on the defendant's very fine family—mother, father, sisters, brother—all of whom were in attendance at the jury proceedings accompanied by many supportive friends, neighbors and community leaders.

The profile I've sketched of Mr. Brown's family and the genuine sympathy I feel for them does not mitigate the punishment or serve as a basis for a sentence of life imprisonment without parole.

Defendant Brown's sentence is bottomed squarely on the balancing of aggravating and mitigating circumstances.

In conclusion, I hold the aggravating circumstances discussed earlier weighted against the absence of mitigat-

ing circumstances compel the court to uphold the jury's advisory verdict affixing punishment at death.

Done and Ordered this the 27th day of March, 1987.

/s/ James H. Hard

JAMES H. HARD, Circuit Judge

Appendix D

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. BOX 351
MONTGOMERY 36101

6th Div. 316 — Jefferson Circuit Court
CC 86-03115

Gary Leon Brown, appellant,

vs.

State of Alabama, appellee

Dear Sir:

You are hereby notified that on March 22, 1988, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

* * *

XXX Application for rehearing overruled. No opinion. Judgment not final, see Rules 39 and 41, A.R.A.P.

* * *

/s/ MOLLIE JORDAN
Clerk
Court of Criminal Appeals of Alabama

NO. 89-219

Supreme Court, U.S.
FILED
SEP 5 1989
JOSEPH F. SPANIOL JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GARY LEON BROWN,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A
WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
P. DAVID BJURBERG*
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ATTORNEYS FOR RESPONDENT

*Counsel of Record

QUESTIONS PRESENTED

I. Whether this Court should grant certiorari where the issue raised was not presented in the courts below.

II. Whether petitioner abandoned his constitutional challenge when he did not brief the constitutional issue to the state supreme court.

PARTIES

The caption contains the names of all parties in the courts below.

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OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and sentence is published as Brown v. State, 545 So.2d 106 (Ala. Cr. App. 1988).

2. The opinion of the Alabama Supreme Court affirming the Alabama Court of Criminal Appeals' affirmance of Petitioner's conviction and sentence is published as Ex parte Brown, 545 So.2d 122 (Ala. 1989).

JURISDICTION

The Alabama Supreme Court denied Petitioner's rehearing on May 5, 1989. On June 23, 1989, Justice Kennedy extended Petitioner's time for filing his petition for certiorari to and including August 3, 1989. The petition was mailed, under an appropriate affidavit, on August 3, 1989.

Respondent maintains that this Court does not have jurisdiction over the Eighth Amendment claim because it was never presented to the state courts. Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); Street v. New York, 394 U.S. 576 (1969). Otherwise, this Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner makes claims allegedly involving the Eighth and Fourteenth Amendments which he has set out in his petition.

STATEMENT OF THE CASE

Petitioner was indicted for the capital offense of murder during a robbery in violation of §13A-5-20(a)(2), Code of Alabama, 1975. The jury found the appellant "guilty of capital murder as charged in the indictment". After the punishment phase of the trial the jury returned an advisory verdict for death by a vote of ten "for death" and two "for life without parole." The trial judge upheld the jury's advisory verdict by sentencing the appellant to death by electrocution.

Petitioner's sole contention in his petition relates to a witness', Jimmy Davenport, testimony. The Alabama Court of Criminal Appeals set out in some detail Davenport's testimony which is reproduced below:

Jimmy Davenport testified that on May 26, 1986, he went fishing with his brother-in-law, James Bynum, Archie Bankhead and the appellant. While fishing, they were drinking beer and whiskey. All four men then went to Chuck and Willie's Lounge to play pool and drink. The four men left the lounge together with Davenport doing the driving.

Davenport stated that he heard them say "something about going and killing a queer, or something like that." (R. 567) They (Bankhead and appellant) both were asking Bynum:

> "'How hard can you hit?' and you know James was saying, 'Pretty hard.' And I guess -- I think Gary asked him 'Well, can you knock this old man out?' And James said, 'yes', he could. And then Gary said, 'Well, if you can't, I can', or something like that. And that's about it." (R. 570)

Bynum gave Davenport directions to the victim's trailer. Bynum, Bankhead and the appellant went up to the victim's trailer and knocked on the door. The victim opened the door and

let them come inside. A short time later all four came back outside the trailer. Bankhead grabbed the victim around the neck in a "headlock". Bynum and the appellant were hitting the victim. (R. 571) Bankhead, Bynum and the appellant picked the victim up and carried him inside the trailer. Davenport observed this while sitting in his car.

Davenport did not see the victim after the altercation. When Bynum, Bankhead and the appellant came out of the trailer, they were carrying items. Davenport observed blood on all three men. The back seat was so full of items from the victim's trailer that the appellant rode in the trunk to Bankhead's house.

The stolen items were taken into Bankhead's residence. Davenport could not remember vel non if he helped carry the items into the house.

Davenport testified that Bankhead gathered all four of their shirts, the appellant's pants and Bankhead's pants and burned them in the backyard. The reason for burning the

clothing was that it had blood on it. Davenport stated that he had blood on the shoulder of his shirt because Bankhead had brushed Davenport's shit when he got into Davenport's automobile.

A wallet was seen by Davenport in Bankhead's kitchen. Davenport received some of the money which the wallet contained.

On cross-examination Davenport admitted that he had not told the grand jury about seeing the wallet in question, Bankhead's burning Davenport's shirt, or statements made by the three men on the way to the victim's house.

The day before the jury for this trial was struck, Davenport talked with Mr. Anderton and Mr. McGregor, assistant district attorneys. After being asked several times, Davenport admitted overhearing statements made on the way to the victim's trailer. Davenport indicated that Anderton had told him that a case could be made against Davenport, but right now they were not going to charge Davenport with any crime.

> Davenport stated that no conversation took place at Bankhead's house because they did not want Bankhead's wife to overhear them.
>
> After cross-examination the prosecution made a motion to require that the taped interview between the prosecutors and Davenport be played for the jury. The reason for this was that the tape would be played instead of rehabilitative testimony.

Brown, 545 So.2d at 108-109.

Other primary evidence against Petitioner consisted of his three voluntary statements to the police, particularly his July 17, 1986 statement wherein Petitioner admitted stabbing the victim "quite a few times". Id. at 111. (See also Appendix A to the Court of Criminal Appeals' opinion beginning at 545 So.2d 116, 117-110, wherein the trial court gives further details from Petitioner's July 17 statement.) A pathologist testified that he found between fifteen and sixteen stab wounds

to the victim's neck and fifty-nine wounds from the neck downward to the base of the victim's shoulder blades. He also found the victim's carotid artery had been slashed. Brown, 545 So.2d at 108-109. Death was caused when the victim bled to death. Id., at 109.

In the state intermediate appellate court, Petitioner presented his claim concerning Davenport's testimony in terms of the Fifth Amendment asserting that it had been coerced by the prosecutors' questioning of Davenport the day before trial. Id., at 113. In his brief to the Alabama Supreme Court, the claim was presented on neither Fifth Amendment nor Eighth Amendment grounds but on prosecutorial misconduct grounds. See Respondent's Appendix A, portions of Petitioner's Brief to the Alabama Supreme Court.

SUMMARY OF THE ARGUMENT

Petitioner's Eighth Amendment claim was never presented to the state courts and thus is not properly before this Court.

Furthermore, Petitioner abandoned his constitutional challenge on either Eighth or Fifth Amendment grounds in the state supreme court when he did not brief the question to that court. Assuming, arguendo, this Fifth Amendment claim was before the state supreme court, it correctly affirmed the lower appellate court's ruling that Petitioner has no standing to assert a testifying third party's Fifth Amendment rights.

ARGUMENT

I.

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE ISSUE PRESENTED HERE WAS NOT RAISED IN THE COURTS BELOW.

Petitioner raises an issue, based on the Eighth Amendment, regarding the use in a capital case of what he calls "coerced evidence." This was not, however, the issue he raised below. As Petitioner admits in his petition (p. 8), he argued this issue to the Alabama appellate courts simply in terms of voluntariness, with no mention of the Eighth Amendment or the special circumstance of this being a capital case. The Alabama Court of Criminal Appeals addressed this issue based on the "Fifth Amendment and Miranda rights",

Brown v. State, 545 So.2d at 113-114, and the Alabama Supreme Court merely affirmed this judgment, Ex parte Brown, 545 So.2d at 122. Thus, the Eighth Amendment issue presented here was not raised below.

This Court has no jurisdiction to decide issues not considered in the state court below. Board of Directors of Rotary International v. Rotary Club of Durante, 481 U.S. 537 (1987); Street v. New York, 395 U.S. 576, 581-582 (1969); Bailey v. Anderson, 236 U.S. 203, 206-207 (1945). Because Petitioner failed to present this Eighth Amendment claim to the Alabama appellate courts, this Court should deny certiorari.

II.

PETITIONER ABANDONED HIS CONSTITUTIONAL CLAIM WHEN HE DID NOT BRIET IT TO THE STATE SUPREME COURT.

Not only was Petitioner's Eighth Amendment claim not raised below, he abandoned his constitutional challenge on either the Eighth or Fifth Amendment grounds in his brief to the Alabama Supreme Court. Instead Petitioner presented his claim in terms of prosecutorial misconduct because they failed to disclose the statement under Rule 18.3 of the Alabama Rules of Criminal Procedure. As presented to the state supreme court, the issue boiled down to one involving an interpretation of a state criminal procedural rule. A state court's interpretation of state law is binding on this Court. Wainwright v. Goode, 464 U.S. 78, 84 (1983). It is axiomatic that issues of

state law do not present questions of a constitutional dimension and therefore this Court does not have jurisdiction over them. Thus, Davenport's testimony, as presented to the Alabama Supreme Court, did not present any constitutional challenge and Petitioner's attempt to reincarnate the constitutional challenge should be rejected by this Court.

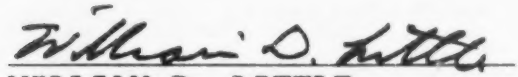
Finally, assuming, arguendo, that the constitutional challenge was somehow presented to the Alabama Supreme Court, it was presented on Fifth Amendment grounds only. The Alabama Court of Criminal Appeals correctly held that Petitioner had no standing to assert Davenport's Fifth Amendment rights. Brown, 545 So.2d at 113-114. See United States v. Nobles, 422 U.S. 225, 234 (1975). Since the Court of Criminal Appeals correctly decided this issue, this Court should deny certiorari.

CONCLUSION

The Court should deny the petition for writ of certiorari to the Alabama Supreme Court.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
OF ALABAMA
BY-



WILLIAM D. LITTLE
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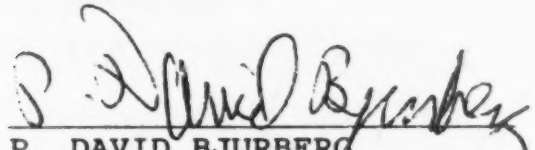

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RESPONDENT'S APPENDIX A

IN THE SUPREME COURT OF ALABAMA

GARY LEON BROWN,	)	
	)	
APPELLANT	)	SC NO._____
	)	
vs.	)	COURT OF CRIMINAL
	)	APPEALS CASE
STATE OF ALABAMA,	)	NO. 6 DIVISION 316
	)	
APPELLEE,		

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF APPELLANT, GARY LEON BROWN

Below is the statement of the issues are presented to the Alabama Supreme Court in Petitioner brief and all of his third argument concerning Davenport's testimony.

I. Whether the trial court erred in denying Appellant's Motion to Suppress statements made by him.

II. Whether the trial court erred in denying Appellant's Motion for Mistrial based upon admission of his statement which contained evidence of other crimes.

III. Whether the trial court erred in refusing to grant a mistrial on the grounds of prosecutorial misconduct.

IV. Whether the court erred in allowing the prosecution to impeach its own witness.

* * * * * * * * * * *

III.

THE COURT ERRED IN REFUSING TO GRANT APPELLANT'S MOTION FOR MISTRIAL ON GROUNDS OF PROSECUTORIAL MISCONDUCT.

The evidence established that the taped interview with the witness Davenport in which he changed his story to implicate Defendant on the issue of

intent was not disclosed until the morning of the trial. The opinion of this court states that Young v. State, 494 So.2d 682 (Al Crim App 1986) should not control because in Young the defense counsel did not learn of the additional statement until the police officer actually testified at trial even though the prosecutor knew about the statement prior to that time. The court in Young noted that temporary Rule 18.3 requires continuing disclosure. The court cited United States v. McElroy, 597 F.2d 459 (2nd Cir 1982) for the proposition that where the government has failed to continue to disclose and the failure substantially prejudiced the defense a reversal is warrant. In Young the court reversed on a single sentence. In the present case this was an entire statement which took over an hour to

replay to the jury. The damaging effect was far greater than that in Young. In Young the sentence was one of life imprisonment. In the present case Defendant's death sentence was based in large part on this improperly admitted statement of Davenport's. The trial court might have granted a continuance to Defendant. Instead it merely allowed Defendant to listen to the damaging tapes prior to cross examination. This did not allow sufficient preparation time to attempt to counter the damaging effect of this piece of evidence. Defendant's motion for mistrial made at R. 620 based upon prosecutorial misconduct was based upon the actions of the State in waiting until the morning of trial to disclose the content of the changed statement. This motion was due to be granted and in denying it the court erred to reversal.

CERTIFICATE OF SERVICE

We, William D. Little and P. David Bjurberg, the members of the Bar of the Supreme Court of the United States, do hereby certify that this 5th day of September, 1989, we did serve the required number of copies of this brief and a copy of the accompanying appendix on attorney for the Petitioner by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Thomas Martelle Goggans
1018 Union Bank Tower
Montgomery, Alabama 36104

We further certify we have served all parties required to be served.

WILLIAM D. LITTLE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

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